

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KELVIN ALLEN,)	Case No. CV 09-9261 TJH(RC)
)	
Petitioner,)	
vs.)	
)	OPINION AND ORDER ON A
People of the State of)	PETITION FOR HABEAS CORPUS
California,)	
)	
Respondent.)	

On December 17, 2009, petitioner Kelvin Allen, a person in state custody proceeding pro se, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging his 1996-97 conviction and sentence in Los Angeles County Superior Court case no. BA125580.

BACKGROUND

This Court, pursuant to Federal Rule of Evidence 201, takes judicial notice of the records in a prior federal habeas corpus action brought by petitioner: Allen vs. Warden Bob Horel, case no. CV 07-2939-TJH(RC) ("Allen I"), which was dismissed as untimely on November 30, 2007. Although petitioner filed a notice of appeal, his request for a certificate of appealability was denied by both this Court and

1 the Ninth Circuit Court of Appeals.

3 **DISCUSSION**

4 The Antiterrorism and Effective Death Penalty Act of 1996
5 ("AEDPA") "greatly restricts the power of federal courts to award
6 relief to state prisoners who file second or successive habeas corpus
7 applications." Tyler v. Cain, 533 U.S. 656, 661, 121 S. Ct. 2478,
8 2481-82, 150 L. Ed. 2d 632 (2001). Specifically, the AEDPA provides:

9
10 Before a second or successive application permitted by this
11 section is filed in the district court, the applicant shall
12 move in the appropriate court of appeals for an order
13 authorizing the district court to consider the application.

14
15 28 U.S.C. § 2244(b)(3)(A).

16
17 This provision "creates a 'gatekeeping' mechanism for the
18 consideration of second or successive applications in district court."
19 Felker v. Turpin, 518 U.S. 651, 657, 116 S. Ct. 2333, 2339, 135
20 L. Ed. 2d 827 (1996); Stewart v. Martinez-Villareal, 523 U.S. 637,
21 641, 118 S. Ct. 1618, 1620, 140 L. Ed. 2d 849 (1998). "An individual
22 seeking to file a 'second or successive' application must move in the
23 appropriate court of appeals for an order directing the district court
24 to consider his application," Martinez-Villareal, 523 U.S. at 641, 118
25 S. Ct. at 1620, and the appellate court "may authorize the filing of a
26 second or successive application only if it determines that the
27 application makes a prima facie showing that the application satisfies
28 the requirements of" Section 2244(b). 28 U.S.C. § 2244(b)(3)(C);

1 Morales v. Ornoski, 439 F.3d 529, 531 (9th Cir. 2006); see also Cooper
 2 v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001) ("When the AEDPA is
 3 in play, the district court may not, in the absence of proper
 4 authorization from the court of appeals, consider a second or
 5 successive habeas application.'" (quoting Libby v. Magnusson, 177
 6 F.3d 43, 46 (1st Cir. 1999)).

7
 8 "[D]ismissal of a section 2254 habeas petition for failure to
 9 comply with the [AEDPA's] statute of limitations renders subsequent
 10 petitions second or successive for purposes of the AEDPA, 28 U.S.C. §
 11 2244(b)(1)." McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009)
 12 (footnote omitted); see also Murray v. Greiner, 394 F.3d 78, 81 (2d
 13 Cir. 2005) ("[The] dismissal of a § 2254 petition for failure to
 14 comply with the one-year statute of limitations constitutes an
 15 adjudication on the merits that renders future petitions under § 2254
 16 challenging the same conviction 'second or successive' petitions under
 17 § 2244(b)."). Since petitioner's initial habeas corpus petition,
 18 Allen I, was denied as untimely, the instant petition is a successive
 19 petition. Ibid.

20
 21 Rule 4 of the Rules Governing Section 2254 Cases in the United
 22 States Courts provides that "[i]f it plainly appears from the petition
 23 and any attached exhibits that the petitioner is not entitled to
 24 relief in the district court, the judge must dismiss the petition and
 25 direct the clerk to notify the petitioner." 28 foll. U.S.C. § 2254,
 26 Rule 4. Here, it plainly appears on the face of the petition that
 27 petitioner has not received authorization from the Ninth Circuit Court
 28 of Appeals for the instant petition to be brought. Thus, this Court

1 must dismiss the instant habeas petition as a successive petition for
2 which it lacks subject matter jurisdiction.

3
4 **ORDER**


5 IT IS HEREBY ORDERED that Judgment be entered SUMMARILY
6 DISMISSING the habeas petition and action for lack of subject matter
7 jurisdiction.¹


8
9 The Clerk of Court shall notify petitioner of the Judgment.

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11 DATED: December 28, 2009

12 PRESENTED BY:

13 DATE: Dec. 21, 2009

14 
15 ROSALYN M. CHAPMAN
16 UNITED STATES MAGISTRATE JUDGE


THE HONORABLE TERRY J. HATTER, JR.,
UNITED STATES DISTRICT COURT JUDGE

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28 ¹ In light of the summary dismissal of this action,
petitioner's motion for appointment of counsel is denied.